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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 289 52798

Office: CALIFORNIA SERVICE CENTER

Date: **NOV 18 2004**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Michael Valdez

for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a liquor store. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a manager. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion counsel submits a brief in which he asserts that the petitioner's depreciation deduction should have been considered in the calculation of the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are unavailable in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on June 23, 1997. The proffered wage as

stated on the Form ETA 750 is \$13.05 per hour, which equals \$27,144 per year. On the Form ETA 750, Part B, the beneficiary indicated that he had worked for the petitioner from March 1995 through June 1995.

With the petition counsel submitted a 2000 Schedule C from the petitioner's owner's Form 1040 U.S. Personal Income Tax Return. That Schedule C pertains to the performance of Liquor II during that year. This office observes that the petitioner in this matter is Palm Liquor I, sometimes referred to merely as Palm Liquor, but that the petitioner in this matter is not Palm Liquor II.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 5, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center stipulated that the evidence should cover 1997, 1998, and 1999 and that any tax returns submitted should be complete with all schedules and tables.

The Service Center also specifically requested the petitioner's Quarterly Wage Reports for the previous four quarters and the Form W-2 Wage and tax statements showing wages the petitioner paid to the beneficiary during 1996 and 1997. This office observes that, on the Form ETA 750, Part B, the beneficiary only claimed to have worked for the petitioner during part of 1995.

In response, counsel submitted the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports for all four quarters of 2001. Those reports show that the petitioner had three employees during the first, second, and fourth quarters, and five employees during the third quarter, but that the petitioner did not employ the beneficiary during any of those four quarters.

Counsel submitted the beneficiary's 1996 and 1997 Form 1040 U.S. Personal Income Tax Returns. Those returns show that the beneficiary incurred \$13,688 in losses during 1996 and \$3,540 in losses during 1997, but had no income.

Counsel also submitted the petitioner's owner's 1997, 1998, and 1999 Form 1040 U.S. Individual Income Tax Returns, including the corresponding Schedules C showing the petitioner's performance during each of those years.

The 1997 Schedule C shows that the petitioner returned a net profit of approximately \$24,164 during that year.¹ The petitioner's owner's Form 1040 shows that he declared a loss of \$18,773 as his adjusted gross income during that year, including the petitioner's entire profit offset by deductions.

¹ The profit shown on the 1997 Schedule C showing the petitioner's profit is not the same amount carried over to line 12 of page one of the Form 1040 tax return. This difference apparently indicates that the petitioner's owner submitted another Schedule C for another business, with the version of the return submitted to IRS, but not with the version provided to CIS. This omission indicates that the petitioner's owner did not comply with the request that any returns submitted to CIS be complete, with all schedules and tables. Because the petitioner submitted two Schedules C with other returns, one for the petitioner and one for Palm Liquor II, this office believes that the missing Schedule C pertains to Palm Liquor II.

The 1998 Schedule C shows that the petitioner returned a net profit of \$34,933 during that year. The petitioner's owner's Form 1040 shows that he declared an adjusted gross income of \$16,473 during that year, including the petitioner's entire profit offset by deductions.

The 1999 Schedule C shows that the petitioner returned a net profit of \$22,239 during that year. The petitioner's owner's Form 1040 shows that he declared an adjusted gross income of \$37,458 during that year, including the petitioner's entire profit.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 19, 2002, denied the petition.

On appeal, counsel asserted that the petitioner's depreciation deduction should be included in the calculation of the petitioner's ability to pay the proffered wage. In support of that decision, counsel submitted a copy of a non-precedent decision of this office.

With that appeal, counsel submitted the petitioner's Form 1040 U.S. Individual Income Tax Return. That return shows that the petitioner's owner declared adjusted gross income of \$55,023 during that year, including all of the petitioner's profits.

The Director, AAO noted that although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding, and that counsel's citation of a non-precedent decision is of no effect. The director further noted that no precedent permits the petitioner to consider its depreciation deduction as a fund available to pay the proffered wage. The director dismissed the appeal on August 25, 2003.

With the motion, counsel submitted the Schedule A and two Schedules C for the petitioner's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns. For each year, one of the Schedules C is pertinent to the petitioner's performance during that year, and the other is pertinent to the performance of Palm Liquor II.

The Schedule C pertinent to the petitioner's performance during 2001 shows that it returned a net profit of \$39,750. The rest of the petitioner's 2001 tax return was not provided.

The Schedule C pertinent to the petitioner's performance during 2002 shows that it returned a net profit of \$53,813 during that year. The rest of the petitioner's owner's 2002 tax return was not provided.

Counsel's principal argument on the motion is to reassert that the petitioner's depreciation deduction should have been considered in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also asserts that the petitioner's business is improving, and the petition should be approved pursuant to the principle of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonegawa, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business

locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that any of the salient years were *uncharacteristically* unprofitable for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. As was noted in the previous decision, no precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary during any of the salient years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989);

K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the proffered wage out of his adjusted gross income and supported himself on the amount remaining.

The priority date is June 23, 1997. The proffered wage is \$27,144 per year.

During 1997 the petitioner's owner declared a loss of \$18,773 as his adjusted gross income. That amount is less than the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

During 1998 the petitioner's owner declared an adjusted gross income of \$16,473. That amount is less than the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner's owner declared an adjusted gross income of \$37,458. That amount is greater than the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, however, he would have been left with a balance of \$10,314 with which to support himself during that year. That amount is apparently insufficient to support the petitioner's owner. The petitioner has not demonstrated that any other funds were available with which the petitioner's owner might have paid the proffered wage or supported himself during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner earned a profit of \$23,875. That amount is insufficient to pay the proffered wage. The petitioner's owner declared adjusted gross income of \$55,023 during that year. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, a balance of \$27,879 would have remained. The petitioner's owner did not list a wife or any dependents on his 2000 Form 1040. The petitioner's owner might reasonably have been expected to support himself on the amount that would have remained if he had been obliged to pay the proffered wage out of his adjusted gross income during that year. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

The petitioner submitted only the Schedules A and C from the petitioner's owner's 2001 and 2002 tax returns. This office cannot find the ability to pay the proffered wage based on partial returns. The petitioner has not submitted evidence sufficient to demonstrate its ability to pay the proffered wage during 2001 or 2002.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 1997, 1999, 2001, or 2002. Therefore, the objection of the AAO has not been overcome on the motion.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The AAO's decision of August 25, 2003 is affirmed. The petition is denied.